

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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HERMINO LOPEZ-SAGASTE, AKA)	Case No. 2:06CV00211 DS
RAMON MONTOYA-LEAL,)	
)	(Crim. 2:04CR430 DS)
PETITIONER,)	
vs.)	MEMORANDUM DECISION
)	AND ORDER
UNITED STATES OF AMERICA ,)	
)	
RESPONDENT.)	

* * * * *

Hermينو Lopez-Sagaste petitions the court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. On September 1, 2004, Petitioner pled guilty to a charge of illegal re-entry of a previously removed alien in violation of 8 U.S.C. § 1326. He was sentenced on November 9, 2004, to 46 months incarceration. At that same hearing Petitioner was also given a consecutive sentence of 6 months incarceration for violation of supervised release in a companion case, 2:99cr0141 DS. Judgement was entered on November 17, 2004. No direct appeal was taken.

The present action is untimely because it was initiated after expiration of the limitations period. As amended by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2255 includes a one-year limitations period for federal prisoners to

file Section 2255 motions.¹ Where as in this case, a defendant does not pursue a timely appeal, the conviction and sentence become final and the one-year limitations period begins running upon the expiration of the time for filing the appeal. See *United States v. Burch*, 202 F.3d 1274, 1278-79 (10th Cir. 2000). The time for filing a notice of appeal expired approximately November 27, 2004, 10 days after judgment was entered on November 17, 2004. See Fed. R. App. P. 4(b)(1)(A) (stating that "[i]n a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days ... of ... the entry of either the judgment or the order being

¹Title 28 U.S.C. § 2255 provides in relevant part as follows:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-

(1)the date on which the judgment of conviction becomes final;

(2)the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3)the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4)the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

appealed"). Because Mr. Lopez-Sagaste filed his Petition more than one year after his sentence became final his Petition is untimely and must be dismissed.

IT IS SO ORDERED.

DATED this 29th day of March, 2006.

BY THE COURT:

A handwritten signature in black ink, appearing to read "David Sam", written in a cursive style.

DAVID SAM
SENIOR JUDGE
UNITED STATES DISTRICT COURT